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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 554

EUREKA LODGE No. 5 INDEPENDENT ELKS (now Eureka Lodge Modern Elks), JERRY O. GILLIAM, and WALTER C. FULFORD,
Petitioners,

v.

GRAND LODGE, IMPROVED, BENEVOLENT, PROTECTIVE ORDER OF ELKS OF THE WORLD,
Respondent.

PETITION FOR WRIT OF CERTOIRARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT.

JAS. G. MARTIN, of Norfolk, Va.,
E. S. PETERS, of Norfolk, Va.,
Counsel for Petitioners.

THE RELIANCE PRESS OF NORFOLK, VA., INC.

Supreme Court of the United States

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No.....

EUREKA LODGE No. 5 INDEPENDENT ELKS (now Eureka Lodge Modern Elks), JERRY O. GILLIAM, and WALTER C. FULFORD,
Petitioners,

v.

GRAND LODGE, IMPROVED, BENEVOLENT, PROTECTIVE ORDER OF ELKS OF THE WORLD,
Respondent.

To the Supreme Court of the United States:

The petition of Eureka Lodge No. 5 Independent Elks (now Eureka Lodge Modern Elks), Jerry O. Gilliam, and Walter C. Fulford shows to this honorable Court as follows, to-wit:

1. The above entitled cause was a civil action in the nature of a suit in equity for injunction, brought in the District Court of the United States for the Eastern District of Virginia at Norfolk, against petitioners by respondent, the chief object of which was to enjoin petitioners from the use in the name of their lodge or otherwise of the word "Elks". The District Court

permitted petitioners to use the word "Elks", if so used as not to confuse it with respondent.

Respondent appealed to the Circuit Court of Appeals for the Fourth Circuit and that court on August 17, 1940, modified the decision of the District Court so as to enjoin petitioners from using the word "Elks", and the matter involved is whether petitioners may use the word "Elks". 114 Fed. (2d), 46.

The opinion of the Circuit Court of Appeals held:

"For the reasons stated, the decree appealed from should be modified so as to forbid defendants' using the word "Elks" in their corporate name, or upon their stationery or literature, and to forbid their using the ritual, emblems, insignia or other paraphernalia of plaintiff order."

2. Petitioners claim that this Court has jurisdiction to review the decree on the basis of Rule 38, Section 5, giving this Court the discretion for review where there are special and important reasons therefor, and Section 240(a) of the Act of February 13, 1925.

Petitioners claim that the question of whether or not they may use the word "Elks" is of great importance to them, and of great importance to vast numbers of other persons in the United States calling themselves "Elks", and to other organizations and businesses.

The reasons relied on for the allowance of the writ are the claims of petitioners that the matter is important to themselves and many others, as above stated, and should be settled by the highest Court.

The Findings of Fact and Conclusions of Law in the District Court were as follows:

FINDINGS OF FACT

1. The plaintiff is a New Jersey corporation, chartered in 1906. The defendant corporation is a Virginia corporation, chartered in 1913, and the individual defendants are citizens of and residents of the State of Virginia, and the Court has jurisdiction because of diverse citizenship, and the amount involved exceeds $3,000.00, exclusive of interest and costs.

2. The Eureka club or association was formed and named in the City of Norfolk, about 1897, before there was any organization of colored persons calling themselves "Elks" anywhere, so far as the evidence discloses. In 1899, this Eureka club was named "Eureka Lodge No. 5, Benevolent, Protective Order of Elks of the World," and associated with what was called "The Grand Lodge Benevolent, Protective Order of Elks of the World".

"Eureka Lodge" has continued as a lodge, actively engaged in fraternal, beneficial and charitable affairs, and now has an active membership of more than four hundred colored men in good standing, and owns valuable property in the City of Norfolk, Virginia. Eureka was a voluntary association until it obtained a corporate charter in the State of Virginia in 1907, which corporate charter thereafter lapsed for failure to pay the franchise tax and registration fee. Another corporate charter was obtained from the State of Virginia in 1913, which continues in force to date, except that after relations were severed in 1939, between Eureka Lodge and plaintiff, Eureka had its corporate charter amended by the State of Virginia, so as to change its name and make its amended name "Eureka Lodge No. 5, Independent

Elks", claiming that this amended name showed it was no longer connected with the plaintiff. Eureka's work is local in the City of Norfolk.

3. Some time prior to 1939 a controversy arose between the plaintiff and defendants, concerning the number of members of Eureka Lodge, and also with respect to a deputy grand master, designated by the Grand Lodge, to have supervision over the district in which Eureka Lodge is located. The defendants contended and still contend that the deputy so designated was an unfit and improper person to occupy the position of deputy. On the other hand, the plaintiff and the grand master contended and still contend that the deputy designated was a fit and proper person to be deputy and that the real reason for defendant's objecting to him as deputy was that the deputy insisted on making an examination of the records and roll of members of Eureka Lodge and, upon such examination, ascertained that Eureka Lodge was paying head taxes to the Grand Lodge on a much smaller number of members than Eureka Lodge actually had. Eureka Lodge refused to pay taxes on the number of members reported by the deputy.

As a result of the controversy the connection of Eureka Lodge and the other defendants with the Grand Lodge was definitely severed and discontinued in the summer of 1939. The plaintiff claims that Eureka Lodge was expelled by the Grand Lodge, while the defendants contend that Eureka Lodge withdrew from the Grand Lodge because of the appointment of said deputy and other actions of the Grand Lodge and its officers, with which defendants were very much dis-

satisfied. It is not necessary to a decision of the case for the Court to determine which of these contentions is more nearly correct.

The Court does find, however, as a fact, that about August 1939, all connection and affiliation of Eureka Lodge with the plaintiff, Grand Lodge, definitely ceased and terminated and has not been renewed.

Following the discontinuance of the affiliation of Eureka Lodge with the Grand Lodge, defendants and others associated with them, obtained an amendment to the charter of Eureka, changing its name from "Eureka Lodge No. 5, Benevolent, Protective Order of Elks of the World" to "Eureka Lodge No. 5, Independent Elks". This new name, when considered along with the letter-heads, literature, emblem and symbols, used by defendants, was misleading and confusing and tended to deceive and mislead the public into believing that defendant lodge was still affiliated with the Grand Lodge. Until some time in November 1939, the defendant lodge used letter-heads that were identical with those it had been using before the separation. These letter-heads carried in its entirety the old name of defendants. The emblem printed on the new letter-heads was identical with that on the old, except a slight difference in the color, due entirely to difference in the density of the printer's ink. The emblem on each letterhead was the most attractive part thereof and naturally the first part to catch the eye of anyone investigating. The new name of the defendants carried "No. 5", although defendant was not after the separation associated or affiliated with any other lodge of Elks, independent, or otherwise. The defendants did not after the separation exercise care to prevent confusion.

Upon application, without notice, the Court granted a temporary restraining order, restraining the defendants from continuing these misleading practices and using the confusing literature and the new name. After an extended hearing on a motion to dissolve the temporary order, the Court refused to dissolve the same and granted a temporary injunction, which remained in force.

LUTHER B. WAY,

March 1, 1940. *United States District Judge.*

CONCLUSIONS OF LAW

1. The defendants should be permanently enjoined from using the name "Eureka Lodge No. 5, Independent Elks", or any other name so similar to the name of the plaintiff organization, which standing alone or in conjunction with other writings or symbols, has a tendency reasonably to mislead or deceive the public into believing that the defendant organization is a subordinate lodge of or is connected with plaintiff. The plaintiff does not possess the right to the exclusion of defendants to use the word "Elks". The defendants also have a right to use the word "Elks" or "Eureka Lodge", or all of these words, as parts of the name in connection with their fraternal activities, provided that in so doing defendants use every reasonable effort to prevent confusion as to the two fraternal orders; that is to say, these words, if and when used by defendants, must be so described, modified or limited by other appropriate words and symbols as to avoid any reasonable conclusion by the public or prospective members that

the defendant organization is connected or affiliated with plaintiff.

LUTHER B. WAY,
United States District Judge.

Norfolk, Virginia,
March 1st, 1940.

Petitioners claim that the following authorities go far towards showing their right to use the word 'Elks".

Benevolent and Protective Order of Elks v. *Improved Benevolent and Protective Order of Elks of the World,* 205 N. Y. 459, 98 N. E. 756, says, in part:

"The *case would be quite different* if the members of the defendant organization had ever been members of the plaintiff corporation and had seceded because of dissatisfaction with its methods of administration or for any other good and sufficient reason. In that event, the representation that the members of the defendant were Elks or had been Elks would be true as a matter of fact, and the use of the parent name as a part of the name of the new society formed by members of the original organization as an offshoot thereof has sometimes been sanctioned. See Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias, 113 Mich. 133, 71 N. W. 470, 38 L.R.A. 658."

The New Jersey case of *State Council of Junior Order of United American Mechanics of New Jersey* v. *National Council of Junior Order of United American Mechanics of North America,* 64 Atl. 561, *is a powerful decision.*

In that case, *the State Council, plaintiff*, which had seceded or been expelled, *enjoined the National Council, defendant,* from setting up in the State of New Jersey, a council with the name of plaintiff.

In that case the Court said, pages 564-5, after saying that plaintiff was justified in withdrawing and not paying the tax imposed by the national council; "Be that as it may, it is quite clear, and both parties agree, that in fact and law all relations between the parties have been fully and completely severed. The defendant says: 'We expelled you'. The complainant says: 'We seceded, and withdrew our allegiance from you'. We have now to inquire what was the effect of this withdrawal and expulsion."

And after showing that even in the Civil War, or War between the States, the United States "never did attempt to destroy the entity of the individual states" (page 567), concludes in part, page 573:

"Such severance did not alter the inherent character of complainant's existence or prevent it from altering the details of its constitution to suit it to an independent existence."

Petitioners respectfully pray that a writ of certiorari be issued out of, and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and send to this Court a full and complete transcript of the record and all the proceedings in this case, to the end that the same may be reviewed and determined by this Honorable Court. And petitioners further pray that the decree of said Circuit

Court of Appeals may be reversed and petitioners permitted to use the word "Elks"; that the mandate of the Circuit Court of Appeals may be stayed until this case is finally decided; and that petitioners may be granted such other and further relief as may seem meet and just.

JAS. G. MARTIN,
Counsel for Petitioners.

E. S. PETERS,
Of Counsel for Petitioners.

STATE OF VIRGINIA,
CITY OF NORFOLK, to-wit:

Before me, the undersigned Notary Public in the City of Norfolk, in the State of Virginia, this day personally appeared Jas. G. Martin, who being duly sworn, deposes and says that he is a member of the bar of the Supreme Court of the United States, and that he is of counsel for petitioners herein; that he has read the

foregoing application for the writ of certiorari, and that all the facts therein stated are true to the best of his belief.

JAS. G. MARTIN.

Subscribed and sworn to before me this 2nd day of November, 1940.

VIRGINIA P. MISTER,
Notary Public.

My commission expires on the 1st day of September, 1942.

NOV 22 1919
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM.

No. 554.

EUREKA LODGE NO. 6, INDEPENDENT ELKS (now EUREKA LODGE MODERN ELKS), JERRY O. GILLIAM, and WALTER C. FULFORD,

Petitioners,

VERSUS

GRAND LODGE OF IMPROVED, BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE WORLD, a Corporation,

Respondent.

RESPONDENT'S REPLY AND BRIEF IN OPPOSITION TO PETITION.

PERRY W. HOWARD,
Washington, D. C.

W. C. HUESTON,
Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM.

No. 554.

EUREKA LODGE NO. 5, INDEPENDENT ELKS (now EUREKA LODGE MODERN ELKS) JERRY O. GILLIAM, and WALTER C. FULFORD,

Petitioners,

versus

GRAND LODGE OF IMPROVED, BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE WORLD, a Corporation,

Respondent.

RESPONDENT'S REPLY AND BRIEF IN OPPOSITION TO PETITION.

Authorities and Argument.

Respondent presents that an examination of the transcript of the record, presented here by the petitioners, and the authorities thereon, when given the most liberal interpretation discloses that the case presented by the petitioners

herein does not come within the class of cases for which the Writ prayed for will be granted. This Writ has been granted as a rule only when matters concerning administrations of Public Officers and Public Boards of political units were involved.

The petitioners in their petition undertake to inform this Honorable Court that this Writ should be granted because, they "claim that the question of whether or not they may use the word 'Elks' in their name is of great importance to them and of great importance to vast numbers of other persons in the United States calling themselves Elks and to other organizations and businesses."

In testing this statement, we first wish to make clear to this Honorable Court, that the refusal of this Writ in no wise interferes with the rights of the White organization known as the Benevolent Protective Order of Elks, for the question of the right of the Respondent to use the word Elks in its name was settled by agreement between the White Elks. (See the Testimony of J. Finley Wilson on Page 192 of the Transcript of the Record herein.)

This agreement has been recognized and acquiesced in by the two Orders hereinabove referred to, the public and the courts. (See Grand Lodge of Improved, Benevolent and Protective Order of Elks of the World v. Grand Lodge Improved, Benevolent Order of Elks of the World, Inc., *et al.*, 4 Cir. 50 F. Ind. 860.)

The Respondent cannot see how the decision of the United States Circuit Court of Appeals, "will be of great importance to other organizations and businesses" for the reason, that it only refers to the use of the distinctive

word "Elks" in the name of a fraternal organization. Certainly the decision sought to be mandated against does not restrict the use of the word as against any other enterprise whatsoever and the Respondent does not so claim.

As to the decision being of great importance to vast numbers of persons calling themselves "Elks" except the Petitioners and the Respondent, the Respondent urges that it is composed of more than fifteen hundred units, with a membership of more than one hundred thousand (See sworn complaint of Respondent—Page 2—of the Transcript Record) and the Petitioners have about four hundred members (See Findings of Fact—Page 3—of Petitioners' Petition herein). That out of the one hundred thousand members of the Respondent against which the petitioners complain only four hundred, and they are those who they claim to represent, are heard to protest against the exclusive use of the word "Elks" by the Respondent as a full and complete examination of the transcript of the record will disclose. And at this point the Respondent urges, that the Petitioners are only excluded from the use of the word "Elks" in their name, by the decision sought to be mandated, so long as they themselves insist by their actions in continuing to be suspended from the Order of the Respondent.

Respondent suspended the Petitioners from its Order because they refused to pay, and agreed to by them, per capita tax, (See J. Finley Wilson's Testimony—Page 182 of the Transcript of Record herein) and under the rules and regulations of the Respondent, shall be restored to it when it has paid the per capita tax for which it was suspended, plus accruing taxes during said suspension, plus a penalty not to exceed Two Hundred Dollars ($200.00) for permitting

itself to be suspended. (See Constitution and By-Laws of Respondent, page 28 of the Transcript of Record herein.)

While the Petitioners sought to contend that they had seceded, it is significant in support of Respondent's contention that Petitioners continued membership unprotestingly for more than a quarter of a century, paid its per capita tax, etc., and did not make an effort to amend its charter until October, 1939, about two months after Respondent suspended it in August, 1939. (See Certificate for Amended Charter by Petitioners—Page 99 of Transcript of Record.) The fact that they were suspended was testified to by one of their counsel here appearing, who was a member at the time of the suspension of the Petitioners, (See Testimony of E. S. Peters—Page 118—Transcript of Record herein) so that we urge that failure of this Honorable Court to grant Writ as prayed for by the Petitioners will not even be fatal and final to them so far as the use of the word "Elks" is concerned and, therefore, not of great importance within the meaning of the rule upon which petitioners attempt to rely for the issuance of the writ.

Moreover, this suspension arose out of the petitioners attempting to suppress the number of their membership in the payment of their per capita tax after they had been members of the respondent Order for more than twenty-five (25) years (See Testimony of W. W. Foreman—Page 174—of the Transcript of Record) and read in this light—"The suspension was a matter of discipline with which the courts in the petitioners state as well as others will not interfere." (Campbell vs. Brotherhood *et al.*, 161 S. E. 144.)

Respondent urges that it is well settled that fraternal and similar organizations will be protected in the use of the distinctive words in their names. The United States Circuit Court of Appeals, speaking through Judge Parker in the instant case simply reaffirmed this well established principle of law.

SEE: Emory v. Grand United Order of Odd Fellows, 140 Ga. 423, 78 S. E. 922.

Knights of Maccabees v. Searle, 75—Neb. 285, 106 N. W. 448.

Grand Lodge Improved, Benevolent and Protective Order of Elks of The World v. Grand Lodge, Improved, Benevolent and Protective Order of Elks of the World, Inc., *et al.*, *Supra.*

St. George Lodge K. of P. v. Rosenthal (Excerpt set out in case next above quoted).

Society of War 1812 v. Society of the War of 1812, 46 App. Div. 568, 62 N. W. Supp. 355.

National Circle Daughters of Isabella v. National Order of Daughters of Isabella, 270 Fed. 273.

International Committee of Young Womens Christian Association v. Young Womens Christian Association, 194 Ill. 194, and many other cases which we feel unnecessary to cite.

Hence, the respondent will be sustained in the exclusive use of the word "Elks" in its name as against the petitioners and all hereinafter similarly situated.

As to further argument upon this point, the respondent relys upon the well stated opinion of Judge Parker in the instant case, which is to be found in the Transcript of the Record beginning on Page 248, because it is much better stated

therein than we can state it here, together with the case Grand Lodge Improved, Benevolent and Protective Order of Elks of the World v. Grand Lodge Improved, Benevolent and Protective Order of the Elks of the World, Inc., *et al.*, *supra*, respondent calls the court's attention to the fact that since the court sought to be mandated rendered its decision in the last case cited about ten years ago.

The issue herein controverted has been well settled, the last as stated therein accepted as the weight of authority of the issues herein involved and the courts have been free of litigation raising this issue. For no case cited by counsel on either side herein is junior in point of time to case referred to.

Respondent urges that to upset this well established principle will cause inextricable confusion in that in this as well as in all other similar organizations whenever persons or groups become dissatisfied for any cause whatsoever with the administrations of said associations. A multiplicity of secessions from them will be had and many organizations will be set up using as part of their names the distinctive word of the parent-organization, thus causing great confusion both among the public and the organizations. When this is likely to be the outcome of the granting of the writ, it will be denied.

14—Corpus Juris Secundus, Page 140 and cases cited thereunder.

Respondent presents that a reading of the whole record shows that the petitioners have not been injured and no manifest injustice has been done them, the case being, in fine, that they were discovered suppressing the number of their members by what is called by respondent, a Dis-

trict Deputy Grand Exalted Ruler, that they became incensed with him, demanded his removal, not having their wishes complied with they became angered, did not pay their proper per capita tax, and in compliance with its Law made and provided therefor, respondent suspended them.

SEE: W. W. Foreman's Testimony beginning on Page 174 of Transcript of the Record. The writ prayed for will not be granted under these circumstances. (See Corpus Juris Secundus 14 —Page 140.)

The whole purpose of the petitioners is to set up and operate a rival organization, using a name with the respondent's distinctive word "Elks" for the purpose of deceiving prospective members and the public into the belief that they are either members of respondent or confusing the identities of the organizations so as to get the benefit of the labor and effort of the respondent acquired by it during many years of enterprise and endeavor.

SEE: Respondent's Exhibit No. 4—on Page 170 A and B, as well as Respondent's Exhibits D on Pages 91, 92, and 93 of the Transcript of Record herein.

Respondent submits that through the years it has engaged in and carried on an extensive welfare program, wherein it has educated several hundred colored youths, operated Health Clinics, Athletic and Civic Departments and continues so to do (See J. Finley Wilson's Testimony, *Supra).* That in doing this, it has acquired a reputation for good among those with whom it seeks to serve and to

secure as members of its Order and is entitled to the benefit of this reputation uninterfered with. That petitioners seek to deprive respondent of this benefit and therefore apply for this writ. Under these circumstances it is respectfully urged that the writ applied for be denied.

Your respondent submits that every question raised in the petition of the petitioners was raised in the court below, carefully considered by it and unanimously decided against them. The court sought to be mandated, had before it the three cases offered by the petitioners, carefully considered them, and in accordance with the weight of authority, decided that said cases did not sustain the contention of the petitioners. (See cases herein above cited.)

Petitioners cite and rely upon Benevolent and Protective Order of Elks v. Improved Benevolent and Protective Order of the Elks of the World, 205 N. Y. 459; 98 N. E. 756.

We point out that even in this case the court held that plaintiff was entitled to the exclusive use of the word "Elks" in its name as being the distinctive word therein and then after so deciding as a matter of *obita dicta* used the words quoted in petitioners' petition, relying for its authority in so using upon the petitioners herein second cited case, namely:

> Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias, 113 Michigan 133; 71 N. W. 470.

Saying, but not adopting as follows:

> "The use of the parent name as part of the name of a new society formed by members of the original organization as an off-shoot thereof has sometimes been sanctioned."

The above cited Pythian case upon which petitioners rely is not only not accepted as sound by the weight of authority, but is based on reasons not in harmony with the issues in this case. The main fact in the Pythian case was that the parent Order had changed its policy in that it though having previously done so would no longer print its rituals in the German language, but henceforth only in English. The new society was composed of practically all Germans, many of whom could speak and read only in German. The court therein wrote a decision offering as its reason in refusing to grant an injunction against the new society this change in policy in order to avoid what it considered an unjust situation. It is to be observed, however, that in rendering this decision the court adopted the opinion of Judge Foster herein above referred to, which in effect is the exact opposite to holding in the Pythian case we are now discussing. This case is therefore unsound and not of value in support of petitioner's petition. So that, the New York case sustains the position of the Respondent and not the Petitioners. The Michigan Pythian case has been held as being unsound by many later decisions and is not in line with many others. (See Grand Lodge etc., *et al.* v. Grand Lodge etc., *et al., Supra;* Emory v. Odd Fellows, *Supra;* Knights of Maccabees v. Searle, *et al., Supra,* and all cases herein cited by Respondent.)

Petitioners cite as their third case in support of their application for this Writ, State Council of the Junior Order of United American Mechanics v. National Council, Jr., Order of United American Mechanics, 64 Atl. 56, and in so doing seek to give the impression that this case favors their position. An examination of this case shows that the contrary is true. In this case the defendant below, the National Council, etc., also sought to change the policy of the organ-

ization against an agreement not to do so unless sustained by a referendum vote, which the Constitution of the National Council required. This coupled with the fact that the State Council when incorporated by the State Legislature was given the authority to set up subordinate lodges and to do such things, as in the Respondent Order, is reserved entirely to it. The fact is the State Council in the case cited occupies the exact position in that case as the Respondent occupies in the instant case, and, therefore, sustains the contention of the Respondent herein. We agree that it does not make any difference in the Law in this case as to whether the Petitioners seceded or were suspended, except that if suspended their position is very temporary and can be immediately remedied by the Petitioners themselves and, therefore, they do not need the aid of the Writ prayed for to protect them.

Petitioners present as analogous matters, the fact that there are many religious organizations which have names very similar and point out that no opposition to this has ever been heard. The fact that no one has objected may be the very reason why the condition mentioned obtains. Freedom as to religion which embraces name, creed and ritual is in the foundation upon which this Nation stands, and, to the everlasting credit of these United States, no one is ever heard to object in any form so far as Religion is concerned, to what name, creed or ritual a person or group desires to use.

As to the reference to the secession of the States, that never really happened. The South attempted secession and the United States by force and arms prevented it. The Respondent sought to prevent disturbance and confusion

and sought the aid of the court in so doing; hence filed the original complaint in this action.

For the reasons herein above set out, the Respondent prays that the application by the Petitioners for a Writ of Certiorari be denied.

Respectfully Submitted,

PERRY W. HOWARD,
Washington, D. C.

W. C. HUESTON,
Washington, D. C.

W. W. FOREMAN,
Norfolk, Virginia.

WALTER H. LAND,
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